UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELECTRONICALLY FILED

DANIEL McGUIRE,

Plaintiff,

-against-

Docket No.

08 Civ.2049 (SCR)

VILLAGE OF TARRYTOWN, Drew Fixell, individually and in his capacity as Mayor of the Village of Tarrytown; Steve McCabe, individually and in his capacity as Village Administrator of the Village of Tarrytown;
Scott Brown, individually and in his capacity as Chief of Police of the Village of Tarrytown; Sergeant Frank J. Giampiccolo, individually and in his capacity as police officer of the Village of Tarrytown; Sergeant John C. Gardner, individually and in his capacity as police officer of the Village of Tarrytown; Sergeant John Barbalet, individually and in his capacity as police officer of the Village of Tarrytown; Sergeant Kevin Barbalet, individually and in his capacity as police officer of the Village of Tarrytown; Police Officer Christopher Cole, individually and in his capacity as police officer of the Village of Tarrytown; Police Officer Gregory M. Budnar, individually and in his capacity as police officer of the Village of Tarrytown; Police Officer Dennis C. Smith , individually and in his capacity as police officer of the Village of Tarrytown; Police Officer Brian F. Macom, individually and in his capacity as police officer of the Village of Tarrytown; Barry Warhit, individually and in his capacity as justice of the Village of Tarrytown; Shameka Taylor, individually and in her capacity as an Assistant District Attorney in the County of Westchester, District Attorney's Office, County of Westchester; County of Westchester

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Plaintiff Daniel McGuire in opposition to (A) the motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) by Assistant District Attorney Shameka Taylor and the County of Westchester (hereinafter referred to collectively as "County Defendants"); and (B) a motion to dismiss pursuant to Fed.R.Civ.P. 12(c) by the Village of Tarrytown, Drew Fixell, Steve McCabe, Scott Brown, Sergeant Frank J. Giampiccolo, Sergeant John C. Gardner, Sergeant John Barbalet, Sergeant Kevin Barbalet, P.O. Christopher Cole, P.O. Gregory M. Budnar, P.O. Dennis C. Smith , P.O. Brian F. Macom, Barry Warhit (hereinafter referred to collectively as "Village Defendants").

FACTS

Plaintiff herein incorporates and includes the facts as illustrated in the complaint, which allegations shall be taken as true for the purposes of motion for dismissal.

Plaintiff Daniel McGuire was and still is a taxpaying, home owning resident of 104 Main St., Tarrytown, New York. On June 8, 2007, at or about noon, plaintiff had a dispute with neighboring renters regarding dumping of refuse on public property adjacent to that of the plaintiff a number of days before the village's regularly scheduled garbage pick ups (in violation of village ordinance). These neighbors, the Loja family, occupy several rental apartments in buildings on opposing sides of plaintiff's property. As the dispute became heated and the neighbors threatened and harassed Plaintiff while throwing refuse toward him, Plaintiff called the police department for assistance.

When Defendant police John Barbalet, Giampiccolo and Cole arrived at Plaintiff's residence, they would not accept his complaint about being assaulted, threatened or harassed. Instead, they told Plaintiff he had no grounds to demand anything of the offensive neighbor, while ignoring Plaintiff's demand to lodge a criminal complaint. Plaintiff notes, here, that upon information and belief, defendant police sergeant Giampiccolo is or was under special assignment to enforce village building and sanitation codes, that he should have been familiar with local codes, but in fact claimed ignorance of the village building and sanitation codes.

At that time, Plaintiff recalled conversation that his offensive neighbor was employed by two Tarrytown police sergeants (brothers Barbalet), in their "side business" Sleepy Hollow Landscaping company. Plaintiff questioned the three defendant police officers as to whether they were protecting the Barbalets' employees when he was told by Sergeant John Barbalet not to be a "wise ass", then threatened by defendant Cole with being arrested himself for disorderly conduct. Defendant again explained that he himself had called police, not over a garbage complaint, but because he had been harassed and threatened by the neighboring Lojas. Plaintiff pointed out the apparent conflict of interest in the ranking responding officer to the incident, and expressed his disappointment with the cavalier attitude of the police officers. No summonses or complaints were lodged as an immediate result of this first call.

A further verbal dispute that night resulted in the Loja neighbor calling police for assistance. Defendants Budnar, Giampiccolo and Smith responded to the call. No tickets or summons were issued as an immediate result of the call. Plaintiff was not questioned at this time by the police. The police report of the incident, however, makes reference to the offending neighbor Loja's later allegation that plaintiff McGuire threatened him with a gun at the earlier noon time altercation. In addition, the police report refers the matter to Detectives Division, which upon information and belief necessarily involved defendant Kevin Barbalet.

On June 9, 2007, plaintiff McGuire was called into Tarrytown Police Headquarters under the guise of addressing his sanitation code complaints. Instead, plaintiff was arrested and charged with menacing for allegedly threatening his neighbor with a pistol. Plaintiff alleges that his arrest was false in that it was manufactured and devised at the direction and behest of the police on the scene of the two altercations, who were offended by having a citizen tell them how to do their jobs, and who customarily accommodated and extended special protection and treatment to the Lojas.

Upon his arrest, plaintiff McGuire objected strongly to all of the police defendants present, including defendants Brown, J. Barbalet, Cole, Macom and Gardner. Plaintiff protested that he was the victim of a false arrest, based upon the conflict of interest inherent in the relationship between the original responding Sergeant/employer Barbalet and plaintiff's offensive neighbor Loja.

Upon his arraignment, plaintiff complained to the local justice court of the conflict of interest and the malicious, false nature of his arrest and prosecution, whereby the local justice advised plaintiff to take his complaints to the District Attorney's Office. Plaintiff was thereafter released on his own recognizance, and subjected to the terms of a temporary order of protection.

Within 72 hours of his June 9 arrest, plaintiff contacted the intake unit of the Westchester County District Attorney's Office. He complained that he was being falsely charged by a police officer, and explained the apparent conflict of interest in pursuing trumped up charges by his neighbor while ignoring plaintiffs own calls for help. The District Attorney's intake unit refused to help or even speak with plaintiff, and referred him to counsel assigned in the local justice court.

On or before June 26, 2007, having received no relief, plaintiff wrote a letter explaining the conflict to defendant Mayor Fixell. Defendant Mayor Fixell thereafter referred the matter to defendant Village Administrator McCabe, who in turn referred the matter back to the police department's chief, defendant Brown. In Village Administrator defendant McCabe's responding letter, he spells out "Village policy. . . not to file cross complaints."

Trial was held in September 2007. At trial, the complaining witness (Loja) acknowledged under cross examination that he was unafraid of being ticketed himself because he works for a police sergeant. It is and was the custom and policy of the Village of Tarrytown and its employees, under color of state law, to afford preferential and protective treatment to the plaintiff's neighbors because of their employment, and despite any conflicts of interest.

Plaintiff's trial defense counsel delineated the apparent conflict of interest to the justice court and the prosecutor, defendant Taylor but defendant Taylor refused to acknowledge that Sergeant Barbalet employed the complaining witness Loja, despite the assertion by the witness himself. Defendant prosecutor Taylor intentionally and effectively avoided calling defendant Sergeant Barbalet as a witness in order to avoid cross examination of the ranking officer responding to the scene of the alleged offense in the action (testimony which, necessarily, would have been exculpatory of plaintiff McGuire). Defendant prosecutor Taylor, along with her office of the District Attorney chose to obfuscate the truth and denied the jury a full and fair representation of the events.

Village Justice defendant Warhit failed to disclose that he had represented a co-defendant of the third Loja brother in a manslaughter and gang assault trial only four years earlier. While this third brother was not one of the witnesses at plaintiff McGuire's trial, his two brothers were. Due to the nature of gang related cases, plaintiff fairly presumes that then defense counsel Warhit was familiarized with other gang and family members in that case. If there was, in fact, some affinity between the justice and the family of witnesses here, defense counsel was unfairly denied an opportunity to move for recusal. The judges omission to disclose his previous acquaintance with the complaining witnesses in this matter raises the suspicions of plaintiff, who, also considering adverse rulings at trial (prohibiting testimony of gang related activity), considers that he was actually prejudiced by defendant Warhit's failure to disclose.

Plaintiff McGuire was acquitted unanimously be a jury of the charges, the criminal action thereby being concluded in his favor.

STANDARD FOR DISMISSAL

To determine a motion for dismissal under Fed.R.Civ.P. 12(b)(6) the court must "test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits." McCray v. City of New York, 03 Civ. 9685 at 28-29 (DAB) (S.D.N.Y. 12-11-2007), *citing* Global Network Communications, Inc., v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006). Therefore, the court "assesses the legal feasability of the complaint, but does not weigh the evidence that might be offered to support it." Id. (*citing* AmBase Corp. v. City Investing Co. Liquidating Trust, 326 F.3d 63, 72 (2d Cir. 2003)). The court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Id. citing* Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001);

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). *See also* Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993).

In addition, "[d]ocuments that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered." *Id. citing* Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007); Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 71 (2d Cir. 1998), *cert. denied,* 525 U.S. 1103 (1999). *See also* Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004); Closure v. Onondaga County, 5:06-CV-926 (N.D.N.Y. 2-7-2007); Blue Tree Hotels Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004).

So in considering dismissal, "the bottom-line principle is that 'once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.'" Roth, 489 F.3d at 510 (*citing* Bell Atlantic v. Twombly, 127 S.Ct. 1955, 1969 (2007). "In order to withstand a motion to dismiss, a complaint must plead, 'enough facts to state a claim for relief that is plausible on its face.'" Patane v. Clark, No. 06-3446-CV 2007 WL 4179838, at 3 (2d Cir. Nov. 28, 2007). *See also* Harris v. City of New York, 186 F.3d 243, 247 (2d Cir. 1999).

Plaintiff posits that he has met his burden in pleading the complaint and attachments. In considering the nature of the present case, plaintiff guides the court to the reasoning Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123 (2nd Cir. 1997), where the Circuit reversed the District Court dismissal because "a jury could find that certain of the individual police officers prepared a false report and initiated a prosecution of plaintiffs predicated on this manufactured evidence. . . . Courts must ensure that such serious accusations receive appropriate scrutiny lest our Court appears to endorse such official misconduct, which would weaken the public's respect for the administration of justice." In addition, the Northern District of New York has denied dismissal against a prosecutor for claims of failing to intervene, false arrest and malicious prosecution where "acts and omissions could reasonably be found to have contributed to causing the violations of [plaintiff's] rights." Noga v. Potenza, 99-CV-941 (N.D.N.Y. 2002).

POINT I

DEFENDANT TAYLOR IS NOT ENTITLED TO
PROSECUTORIAL IMMUNITY

County defendants' argument for absolute prosecutorial immunity is simplistic at best. This court has held that "whether a prosecutor has absolute immunity 'depends principally on the nature of the function performed, not on the office itself.'" Richards v. City of New York, 97 Civ 7990 (MBM) (S.D.N.Y. 1998) at 4 *citing* Ying Jing Gan v. City of New York, 996 F.2d 522, 530 (2d Cir. 1993); Kalina v. Fletcher, 139 L.Ed 2d 471, 118 S. Ct. 502, 508 (1997). *See also* Hickey v. City of New York, 01 Civ. 6506 at 3(GEL) (S.D.N.Y. 2002) ("[C]ourts are to apply a 'functional approach' examining 'the nature of the function performed, not the identity of the actor who performed it." *citing* Doe v. Phillips, 81 F.3d 1204, 1209 (2d Cir. 1996)).

Many courts have embraced the doctrine of absolute prosecutorial immunity since its introduction in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976), despite the fact that such an immunity is anathema to the intent of the legislative framers of the 1871 reconstruction laws (42 U.S.C. § 1983 *et seq*.). In fact, there was no precedent for absolute prosecutorial immunity until 1896, decades after the statutes were enacted. *See* Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896). Resulting case law from the circuit courts shows that the doctrine is both wrong and unworkable, and has served to deny a remedy where prosecutors have intentionally violated clearly established constitutional guarantees. *See* Brigham Young University Law Review: Reconsidering Absolute Prosecutorial Immunity, Margaret Z. Johns (2005).

Exceptions

"[A] prosecutor does not qualify for absolute immunity where he or she acts outside his or her role as an advocate, or clearly outside any colorable claim of authority. Thus, if a prosecutor acts in an investigative capacity . . . then absolute immunity cannot be invoked." McCray, 03 Civ. 9685 at 43 *citing* Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (finding that prosecutors' cooperative efforts with police was investigative and not protected by absolute immunity); Schmueli, 424 F.3d at 237 (2005); Burns v. Reed, 500 U.S. 478 (1991). In Crews v. County of Nassau, 06-CV-2610 (E.D.N.Y. 12-27-2007) that court found that after being provided exculpatory information, prosecutor "did not inform [Plaintiff's] counsel or the . . . Court , or investigate this exculpatory information." *Id.* at 3. "Absolute immunity does not protect such alleged misconduct that took place in the course of participation in and supervision of criminal investigations." *Id*. at 19 *citing* Russo v. City of Hartford, 158 F.Supp 2d 214, 231 (D. Conn. 2001) (denying absolute immunity to prosecutors who, *inter alia*, allegedly 'continued to pursue the illegal criminal investigation of the Plaintiff.'"). *See also* Kalina v. Fletcher, *supra* (No prosecutorial immunity when prosecutor signs/certifies application for arrest warrant, which is akin to becoming a witness); Zahrey v. Coffey, 221 F.3d 342 (2nd Cir. 2000) (No immunity when prosecutor fabricated evidence) .

The question here is whether the functions performed by defendant ADA Taylor investigative or advocative. While County defendants argue that ADA is protected by her position as the prosecutor, plaintiff posits that due to the unique nature of local justice court prosecutions, ADA Taylor necessarily performed advocative functions simultaneously with investigative functions. In Barbera v. Smith, 836 F.2d 96, 100 (2nd Cir. 1987) the circuit has expressly renounced a "bright line" rule based upon the time line of a prosecution, acknowledging that investigative function continues after the initiation of a prosecution. The Barbera court applied a functional approach to determine that the acquiring of evidence is an investigative function and concluded that "when a prosecutor performs an investigative or administrative function rather than a prosecutorial one, absolute immunity is not available." *Id.* at 99 *citing* Powers v. Coe, 728 F.2d 97, 103-04 (2d Cir. 1984); Taylor v. Kavanagh, 640 F.2d 450, 452 (2d Cir. 1981).

At the time that ADA Taylor acquired evidence that was exculpatory to plaintiff, she put on her investigator's hat. It is in her refusing to investigate or acknowledge this exculpatory evidence that defendant ADA Taylor allowed plaintiff's rights to be violated. The complaint herein provides allegations and attachments that raise the material issue of fact and fair question for a jury as to whether defendant ADA Taylor was acting in an investigative or advocative capacity when she acquired exculpatory evidence. Plaintiff posits that upon the testimony elicited at trial, a reasonable prosecutor would have investigated further, and/or called defendant John Barbalet to testify for the benefit of the jury. He was not only the ranking officer at the alleged scene of the crime, but he was at the center of the conflict the jury was hearing about through other testimony. Plaintiff additionally posits that if defendant ADA Taylor did agree to avoid using defendant John Barbalet as a witness, such agreement was solely for the purpose of pursuing the prosecution of plaintiff herein, without regard to his liberty interests and rights. Since the prosecution of plaintiff McGuire was one of only a few criminal trials in Tarrytown that year (if not the only criminal trial), defendant ADA Taylor was certainly being supervised and advised by the Westchester County District Attorney's Office. Assuming that defendant ADA Taylor was being closely supervised due to her newness to the post, her supervisor must have been party to the decision to either forego investigation or suppress the potentially exculpatory testimony of defendant John Barbalet. These are all facts and allegations fairly inferred from the complaint that would present a question to a jury as to the existence of a conspiracy as addressed below. *See* Dory v. Ryan, 25 F.3d 81, 82 (2d Cir. 1994) (P.O. and DA "were not protected by absolute immunity, because they were being sued for their participation in an extra-judicial conspiracy to deprive [Plaintiff] of his constitutional rights." *citing* San Filippo v. United States Trust Co., 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985) (holding that absolute immunity does not "cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony.")).

In the event that the Court does not see the requisite specificity in Plaintiff McGuire's pleading papers, he would pray for leave to amend the pleadings as necessary. Bernard v. County of Suffolk, 356 F.3d 495 (2nd Cir. 2004) (Investigative misconduct claim could be clarified through amended pleadings).

POINT II

THE COURT SHOULD NOT DISMISS COMPLAINT AGAINST THE COUNTY DEFENDANTS, OR ALTERNATIVELY SHOULD GRANT LEAVE TO AMEND THE NOTICE OF CLAIM AND/OR COMPLAINT FOR CLARIFICATION OF CAUSES AGAINST COUNTY DEFENDANTS

SERVICE -NOTICE OF CLAIM

"[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." Closure v. Onondaga County, at 7. "The deficiencies in the method of service are harmless error under Rule 61 of the Federal Rules of Civil Procedure when the party asserting the deficient service has actual knowledge of the action and suffers no prejudice." Arum v. Miller, 193 F.Supp.2d 572, 579 (E.D.N.Y. 2002) *citing* St. John Rennalls v. County of Westchester, 159 F.R.D. 418, 420 (S.D.N.Y. 1994); Thomas v. Yonkers Police Dep't, 147 F.R.D. 77, 79 (S.D.N.Y. 1993).

Plaintiff posits that the filing of the notice of claim with Tarrytown provided actual and effective notice to those defendants named herein. Should the Court find that the notice of claim is in some way deficient, plaintiff hereby petitions for leave to amend and file late notice of claim. Vitale v. Hagan, 71 N.Y.2d 955, (1988) ("The trial court has discretion under the statute to grant leave to file a late notice of claim . . ." *citing* General Municipal Law § 50-e[5]). *See also* Bernard v. County of Suffolk, 356 F.3d 495 (2nd Cir. 2004) (Investigative misconduct claim could be clarified through amended pleadings).

CAUSES OF ACTION AGAINST COUNTY DEFENDANTS

The complaint contains allegations and attachments that might lead a jury to find that (1) the Westchester County District Attorney has a policy and custom of refusing cross complaints, thereby depriving plaintiff of his constitutional right to redress his grievances; (2) there was a *conspiracy* between the police defendants and assistant district attorneys, (3) that defendant ADA Taylor and her as of yet unnamed supervisors *failed to intervene* upon learning that plaintiff McGuire deserved their protection, (4) that the County defendants in their disregard maliciously prosecuted plaintiff, and (5) that such misconduct was fostered by a lack of training and supervision by the highest levels of that prosecutor's office. *See* Noga v. Potenza, 99-CV-941 (N.D.N.Y. 2002) (dismissal denied where "acts and omissions could reasonably be found to have contributed to causing the violations of [plaintiff's] rights." - duty to intervene, false arrest, malicious prosecution).

The Second Circuit in Savino v. City of New York, 02-7108 (2nd Cir. 2003) delineated the elements of malicious prosecution as "(1) the initiation of a proceeding, (2) its termination favorably to the plaintiff, (3) lack of probable cause, and (4) malice." *citing* Colon v. City of New York, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453, 455 (1983). *See also* Garrett v. Port Authority of New York, 04 Civ. 7368 (DC) (S.D.N.Y. 8-7-2006). "With respect to the fourth element, malice need not connote actual spite or hatred, but means only 'that the defendant must have commenced the criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served.'" Arum v. Miller, 193 F.Supp.2d at 583, *citing* Lowth v. Town of Cheektowaga, 82 F.3d 563, 572 (2nd Cir. 1996); Nardelli v. Stamberg, 44 N.Y.2d 500, 502-3, 406 N.Y.S.2d 443, 445 (1978). *See also* Sargent v. County of Nassau, 04-Civ-4274 at 18

(E.D.N.Y. 3-13-2007) (Malice as a " . . . wrong or improper motive, something other than a desire to see the ends of justice served." *citing* Khan v. Ryan, 145 F.Supp. 2d 280, 285 (E.D.N.Y. 2001)).

The Second Circuit has delineated the duty to intervene in Anderson v. Branen, 17 F.3d 552 (2nd Cir. 1994):

> "It is widely recognized that all law enforcement official has a duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence. . . . An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know . . . that a citizen has been unjustifiably arrested [citation omitted] . . .or that any constitutional violation has been committed by a law enforcement official. " *Id*. at 557 *citing* O'Neil v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986).

Concerning the failure of the county defendants to intervene, the Eastern District of New York instructed in Muzio v. Incorporated Village of Bayville, 99-CV-8605 (E.D.N.Y. 2006) that:

> "[P]ersonal involvement of a supervisory or high official may be established by evidence of direct participation by that official in the challenged conduct, or by evidence of that official's '(1) failure to take corrective action after learning of a subordinate's unlawful conduct, (2) creation of a policy or custom fostering the illegal conduct, (3) gross negligence in supervising subordinates who commit unlawful acts, or (4) deliberate indifference to the rights of others by failing to act on information regarding the unlawful conduct of subordinates.'" at 9 *citing* Hayut v. State Univ. of New York, 352 F.3d 733, 753 (2d Cir. 2003).

Should this Court decide that some of the county defendants are improperly summoned or notified, Plaintiff prays for leave to amend the pleadings appropriately.

DAMAGE AND OTHER CAUSES

Given the allegations and attachments in the complaint, it is possible that a jury might find that county defendants did conspire in the deprivation of plaintiffs rights under the First

Amendment, Second Amendment, Fourth Amendment and Fourteenth Amendment. His First Amendment right to redress his grievances was directly curtailed by the local prosecutors' refusal to take "cross complaints." "The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person - i.e., the right to be free of unreasonable or unwarranted restraints on personal liberty. . . . [travel restrictions] as condition of release, and the obligation to appear in court, constitute 'seizures' within the meaning of the Fourth Amendment . . ." Willner v. Town of North Hempstead, 977 F. Supp 182, 188-89 (E.D.N.Y. 1997) *citing* Murphy v. Lynn, 118 F.3d 938, 946 (2nd Cir. 1997). "[T]here must be a post-arraignment seizure for a § 1983 malicious prosecution claim; however, the requirements of attending criminal proceedings and obeying the conditions of bail suffice on that score." Jocks v. Tavernier, 316 F.3d 128, 136 (2nd Cir 2003). Plaintiff's Second Amendment right to retain his sidearm was impeded due to the Temporary Order of Protection issued in the criminal matter.

POINT III

THE CONSPIRACY CLAIMS UNDER 42 U.S.C. §§ 1985 AND 1986 ARE SUFFICIENT TO WITHSTAND DISMISSAL

In general, a claim for civil conspiracy "must present evidence that the Appellees acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in Appellants' deprivation of a constitutional right ." Hinkle v. City of Clarksburg, West Virginia, 81 F.3d 416, 421 (4th Cir. 1996) *citing* Hafner v. Brown, 983 F.2d 570, 577 (4th Cir. 1992).

County defendants state more specifically, that an effective claim under 42 U.S.C.§ 1985 needs to allege "(1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States." Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999).

Given all of the allegations and attachments in the complaint as true, a jury could reasonably find that the prosecutor here conspired and agreed with Village defendants to continue the prosecution and avoid the disclosure of exculpatory testimony to the jury. There was plenty of opportunity and motivation (not to impede the prosecution). The complaint need not spell out specific facts in furtherance, because a conspiratorial "agreement can be proved by circumstantial evidence." Ricciuti, 124 F.3d at 131 *citing* Hinkle, 81 F.3d at 421. Injury has been discussed in Point II *supra*.

Village defendants argue here for dismissal because plaintiff is not part of a "protected class." Their case references, however, are all highly distinguishable because they are largely employment discrimination cases. Plaintiff points to the plain language of 42 U.S.C. 1985 in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, **any person or class of persons** of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an

> action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The Eastern District of New York has determined that a claim of unequal protection requires an allegation that "similarly situated people were treated differently . . . ." Willner v. Town of North Hempstead, 977 F. Supp at 191. In the context of selective enforcement, that court similarly held that unequal protection "was based on impermissible considerations such as race, religion, *intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.*" Muzio, at 13, *citing* Harlen Associates v. Incorporated Village of Mineola, 273 F.3d 494 (2d Cir. 2001). Again considering all of the allegations and attachments in the complaint as true, a jury could reasonably find that the Village defendants did conspire to falsely arrest plaintiff, continue the prosecution, and avoid the disclosure of exculpatory evidence to the jury. Village defendants are therefore mistaken when they posit that the claims under §§ 1985 and 1986 must fail.

In addition, Village defendants have interposed their eleventh affirmative defense of the "intra-corporate conspiracy doctrine" in their answer, which should be addressed here. First, plaintiff posits that since the conspiracy alleged here was amongst Village police as well as the prosecutors, the defendants cannot avail themselves of the defensive doctrine. These are not all members of the same municipal corporation. Secondly, the village defendants' bare (to say the least) assertion of the defense does not acknowledge an important intra-corporate conspiracy doctrine exception, "where the individuals are 'motivated by an independent personal stake in achieving the corporation's objective'." Little v. City of New York, 487 F.Supp.2d 426 (S.D.N.Y. 2007) *citing* Salgado v. City of New York, No. 00 Civ. 3667 (RWS), 2001 WL

290051, at 8 (S.D.N.Y. March 26, 2001). Given the allegation in the complaint as true, a jury could therefore find that village defendants were motivated by personal stakes.

POINT IV

DEFENDANT VILLAGE JUSTICE WARHIT IS NOT ABSOLUTELY IMMUNE

N.Y. Judiciary Law § 14 provides in pertinent part that "[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he . . . is related by consanguinity or affinity to any party in the controversy." *See also* Frase v. McCray, 9:01-CV-1704 (N.D.N.Y. 2003)**.** The complaint herein alludes to his representation of a third brother to the complaining witnesses in a violent gang case. "New York's Court of Appeals has observed that, absent statutory grounds, a trial judge's alleged bias, prejudice, or unworthy motives will not constitute grounds for recusal unless it is shown to have affected the result." *Id. citing* People v. Moreno, 70 N.Y.2d 403, 407 (1987); People v. Brown, 141 A.D.2d 657, 658 (2d Dep't 1988). Defendant Justice Warhit made adverse rulings at plaintiff's criminal trial, to wit, preventing testimony about alleged gang activity at the complaining witnesses' residence.

Justice Warhit's failure to disclose his affinity to the two complaining witnesses was "so serious and flagrant that it goes to the very integrity of the [proceeding]." Taylor v. Vermont Dept. of Educ., 313 F.3d 768 (2nd Cir. 2002)**,** *citing* Jarvis v. Ford Motor Co., 283 F.3d 33, 62 (2d Cir. 2002). Plaintiff posits that defendant Justice Warhit's decision to remain silent about this affinity was outside of his judicial authority, as clearly stated in the Judiciary Law. Absolute judicial immunity, therefore, should not be provided.

POINT V

CLAIMS AGAINST DEFENDANT KEVIN BARBALET
ARE SUFFICIENT TO SURVIVE THE MOTION

Given the allegations and attachments in the complaint, a jury could reasonably conclude that defendant Kevin Barbalet failed to intervene, thereby entering the conspiracy claimed. Kevin Barbalet is the brother and partner of defendant John Barbalet. John Barbalet was the ranking police officer at the subject confrontation herein, and used his position under color of law to offer special protection to employees of his and brother Kevin's. Plaintiff believes that defendant Kevin Barbalet is or was a Sergeant of detectives as well as brother and business partner to John, and must have known of the circumstances surrounding plaintiff's false arrest and malicious prosecution. As such, plaintiff posits that defendant Kevin Barbalet failed his duty to intervene on behalf of plaintiff who was being "framed" (in the vernacular). This defendant's motivations are clear, as he had both fraternal and business interest in seeing his brother/partner's case against plaintiff succeed. *See* Anderson v. Branen, 17 F.3d 552, 557 (2nd Cir. 1994) ("An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know . . . that a citizen has been unjustifiably arrested [citation omitted] . . .or that any constitutional violation has been committed by a law enforcement official."); Noga v. Potenza, 99-CV-941 (N.D.N.Y. 2002) ("acts and ommissions could reasonably be found to have contributed to causing the violations of [plaintiff's] rights.").

CONCLUSION

In closing, plaintiff expresses satisfaction that village defendants have had sleepless nights regarding this litigation. They are little recompense, however, for the sleep lost when a cop faces criminal charges (as was plaintiff McGuire's burden). Plaintiff McGuire continues to lose sleep due to continued harassment at the hands of these small town bullies.

WHEREFORE , based upon the grounds stated herein, plaintiff prays this Court to DENY DISMISSAL as to all defendants, and grant DISMISSAL OF VILLAGE DEFENDANTS' AFFIRMATIVE DEFENSES; or in the alternative, to grant plaintiff leave to amend the pleadings; and for any relief the Court deems just and proper.

Respectfully submitted,

____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK Index No. 08-2049

DANIEL MCGUIRE,
Plaintiff,
-against-

VILLAGE OF TARRYTOWN; **DREW FIXELL,** individually and in his capacity as Mayor of the Village of Tarrytown; **STEVE MCCABE**, individually and in his capacity as Village Administrator of the Village of Tarrytown; **SCOTT BROWN**, individually and in his capacity as Chief of Police of the Village of Tarrytown; **SERGEANT FRANK J. GIAMPICCOLO**, individually and in his capacity as police officer of the Village of Tarrytown; **SERGEANT JOHN C. GARDNER**, individually and in his capacity as police officer of the Village of Tarrytown; **SERGEANT JOHN BARBELET**, individually and in his capacity as police officer of the Village of Tarrytown; **SERGEANT KEVIN BARBELET**, individually and in his capacity as police officer of the Village of Tarrytown; **POLICE OFFICER CHRISTOPHER COLE**, individually and in his capacity as police officer of the Village of Tarrytown; **POLICE OFFICER GREGORY M. BUDNAR**, individually and in his capacity as police officer of theVillage of Tarrytown; **POLICE OFFICER DENNIS C. SMITH**, individually and in his capacity as police officer of the Village of Tarrytown; **POLICE OFFICER BRIAN F. MACOM**, individually and in his capacity as police officer of the Village of Tarrytown; **BARRY WARHIT**, individually and in his capacity as justice of the Village of Tarrytown; **SHAMEKA TAYLOR**, individually and in her capacity as an Assistant District Attorney in the County of Westchester, **DISTRICT ATTORNEY'S OFFICE**, County of Westchester; **COUNTY OF WESTCHESTER, STATE OF NEW YORK**

OPPOSITION TO DISMISSAL - NOTICE OF CROSS MOTION

Law Office of
Charles O. Lederman
Attorney for Plaintiff
15 Avondale Road
White Plains, New York 10605
(914)557-0181

To:

Service of a copy of the within is hereby admitted.

Dated : May 30 2008

Attorney(s) for Defendant

____

DATED: May 30, 2008

STATE OF NEW YORK, COUNTY OF WESTCHESTER ss:

I, the undersigned, an attorney admitted to practice in the courts of New York State,

☐ Attorney's Certification — certify that the within OPPOSITION has been compared by me with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — state that I am the attorney of record for **Daniel McGuire** in the within action; I have read the foregoing OPPOSITION and know the contents thereof; the same is true to my knowledge, except as to the matters therein alleged to be on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by **Daniel McGuire** is:

I affirm that the foregoing statements are true, under penalties of perjury.

Dated: May 30, 2008 Charles O. Lederman

STATE OF NEW YORK, COUNTY OF WESTCHESTER ss:

I, the undersigned, being duly sworn, depose and say: I am

☐ Individual Verification — in the action; I have read the foregoing OPPOSITION and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

☐ Corporate Verification — the _______________ of ____________________ a ___________________ corporation and a party in the within action; I have read the foregoing OPPOSITION and know the contents thereof; and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Review of Documents and records

Sworn to before me on

____

Daniel McGuire, Plaintiff

STATE OF NEW YORK, COUNTY OF WESTCHESTER ss:

I, the undersigned attorney duly admitted to practice before the Courts of the State of New York says the following under the penalties of perjury:

On I served the within OPPOSITION

☐ by mailing a copy to each of the following persons at the last known address set forth after each name below.

☐ by delivering a true copy of each personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as a party therein:

☐ by transmitting a copy to the following persons by ☐ FAX at the telephone number set forth below after each name below ☐ E-MAIL at the E-Mail address set forth after each name below, which was designated by the attorney for such purpose, and by mailing a copy to the address set forth after each name.

☐ by dispatching a copy by overnight delivery to each of the following persons at the last known address set forth after each name below.

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